FILED
OCT 11 1944
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 584

EURUS CADY,

Appellant,

vs.

STATE OF GEORGIA

APPEAL FROM THE SUPREME COURT OF THE STATE OF GEORGIA

STATEMENT AS TO JURISDICTION

HARRY M. WILSON,
E. L. GRANTHAM,
R. A. MOORE,
Counsel for Appellant.

INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Opinion in the Court below	1
Jurisdiction	2
The appeal is timely	2
State statutes the validity of which is involved	3
Nature of the case	4
Federal questions were properly raised and decided adversely to the appellant	7
Appeal is from a final judgment of the highest court of the State of Georgia—the Supreme Court of Georgia	10
The federal questions presented are substantial and vital and were actually passed on by the Supreme Court of Georgia	10
Conclusion	17
Appendix "A"—First statement of fact by Supreme Court	18
Appendix "B"—Opinion of the Supreme Court of Georgia	19

Table of Cases Cited

Fiske v. *Kansas*, 274 U. S. 380	17
Griffin v. *State*, 183 Ga. 775	14
Mobile, etc., Railroad Co. v. *Turnipseed*, 219 U. S. 35, 31 Sup. Ct. 136, 55 L. Ed. 78, 32 L. R. D. 226, Ann. Cas. 1912, 436	15
Melton v. *State*, 180 Ga. 104	15
Powers v. *State*, 172 Ga. (4)	14
Rawlins v. *State*, 124 Ga. 31, 201 U. S. 638	10,11

Statutes Cited

Code of Georgia, Section 38–1604 (Acts 1866, p. 139; 1880–1, p. 121; 1927, p. 145)	4
Code of Georgia, Section 59–106 (Acts 1878–9, pp. 27, 34; 1877, p. 31; 1892, p. 61; 1899, p. 44)	4,9

Page

Code of Georgia, Section 74–9902 (Acts 1866, p. 139; 1880–1, p. 121; 1927, p. 145) 9
Constitution of Georgia, Article I, Section 1, Par. III .. 6,8
Constitution of the United States:
14th Amendment 6,7,9,10,12,13
19th Amendment 9,10,12,13
Judicial Code, Section 237(a), as amended by the Acts of February 13, 1925, January 31, 1928 and April 26, 1928, (28 U. S. C. A. 344a) 2

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 584

EURUS CADY,

vs. *Appellant,*

STATE OF GEORGIA,

Appellee

APPEAL FROM SUPREME COURT OF GEORGIA

STATEMENT AS TO JURISDICTION

In compliance with paragraph 1 of Rule 12 of the Rules of the Supreme Court of the United States, the appellant submits herewith his statement upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment in the above entitled cause.

Opinion in the Court Below

The opinion of the Supreme Court of Georgia has not been officially reported, though it has been filed and a copy thereof is appended hereto. The case is one in which there was no written opinion by the trial court, none being neces-

sary. The verdict of the jury, the sentence based thereon, and an order denying a new trial, are specified in a stipulation, as to the record, filed with the clerk of the Supreme Court of Georgia.

Jurisdiction

This court has jurisdiction under section 237 (a) of the Judicial Code as amended by the Acts of February 13, 1925, January 31, 1928, and April 26, 1928 (28 U. S. C. A. Section 344a) to review the judgment of the court below upon appeal.

I

The Appeal Is Timely

A judgment of the Supreme Court of Georgia in this cause was entered in the first instance on June 8, 1944. A motion for rehearing was filed on June 17, 1944, and denied on July 18, 1944; but in the interim the opinion as written and filed in the first instance was modified by substituting the statement of fact which formed the first three pages thereof with a new statement of fact. A copy of the first statement of fact is appended to the copy of the opinion which is appended hereto. Application was presented on July 24 for leave to file a second motion for rehearing. Leave to file was denied for the stated reason, concurred in by three justices, that the court has adjourned on July 21. The statutory adjournment period was July 31, although the statute does provide that the court may, by order, adjourn in advance of the statutory adjournment. The application for leave was within the ten days provided for the filing of a motion for rehearing by rule 40 (a). On the same date; namely, July 24, 1944, an application was made for order staying the remittitur for the purpose of allowing time to prepare and present an appeal. An order staying the remittitur for a period of forty days from that date was

entered. Said order was subsequently enlarged to fifty days, and on this the 6th day of September a petition for the allowance of an appeal was presented to Hon. R. C. Bell, Chief Justice of the Supreme Court of Georgia, who allowed the same, on said date and ordered that a certified transcript of the record, proceedings, and judgment as specified in the stipulation filed, be transmitted to the Supreme Court of the United States within forty days from the date; namely, September 6, 1944, and that the remittitur be stayed pending the appeal. On the same date, Hon. R. C. Bell, Chief Justice as aforesaid caused citation to be issued, directed the State of Georgia, citing the State of Georgia be and appear at the Supreme Court of the United States in Washington, D. C. within forty days from the date thereof; to wit, 40 days from September 6, 1944, to show cause, if any there be, why the judgment and sentence rendered against the appellant, should not be corrected, which citation was served upon the appellee by service upon T. Grady Head, Attorney General of Georgia, D. W. Bennett, Solicitor General of the Waycross judicial circuit, and D. C. Sapp, attorney, on September 7, 1944.

II

The validity of two state statutes under the Federal Constitution was drawn into question, and the decision of the Supreme Court of Georgia was favorable to the validity of each.

(a)

Section 59-106 of the Code of Georgia reads as follows: Revision of jury lists. Selection of grand and traverse jurors.—Biennially, or, if the judge of the superior court shall direct, triennially on the first Monday in August, or within 30 days thereafter, the board of jury commissioners shall revise the jury lists. The jury commissioners shall se-

lect from the books of the tax receiver upright and intelligent men to serve as jurors, and shall write the names of the persons so selected on tickets. They shall select from these a sufficient number, not exceeding two-fifths of the whole number, of the most experienced, intelligent, and upright men to serve as grand jurors, whose names they shall write upon other tickets. The entire number first selected, including those afterwards selected as grand jurors, shall constitute the body of traverse jurors for the county, to be drawn for service as provided by law, except that when in drawing juries a name which has already been drawn for the same term as a grand juror shall be drawn as a traverse juror, such name shall be returned to the box and another drawn in its stead. (Acts 1878-9, pp. 27, 34; 1877, p. 31; 1892, p. 61; 1899, p. 44.)

(b)

Code section 38-1604 reads as follows: Husband and wife as witnesses against each other in criminal proceedings. —Husband and wife shall not be competent or compellable to give evidence in any criminal proceeding for or against each other, except that either shall be competent, but not compellable, to testify against the other upon the trial for any criminal offense committed, or attempted to have been committed, upon the person of either by the other. The wife shall be a competent witness to testify for or against her husband in cases of abandonment of his child, as provided in section 74-9902. (Acts 1866, p. 139; 1880-1, p. 121; 1927, p. 145.)

III

Nature of the Case

("R" followed by numerals indicates pages of transcript of record of Supreme Court of Georgia.)

At the October term 1942 of the Superior Court of Coffee county, Georgia a special presentment was returned by the

grand jury then and there sitting, charging and accusing the defendant, now the appellant, with murder. (R. p. 1.)

The defendant, now appellant, entered his plea of not guilty. (R. p. 2) The case came on for trial and he filed his written challenge to the array of jurors, charging their inproper selection, and that Code section 59-106 of Georgia has been misinterpreted so as to exclude women from juries ever since August 26, 1920, the effective date of the XIXth amendment to the Constitution of the United States, and that such misinterpretation and the exclusion of women from juries for the reasons therein alleged deprived him of his liberty without due process of law, and denied to him the equal protection of laws, all guaranteed by the XIVth amendment to the Constitution of the United States. (R. pp. 3-15) Evidence on the challenge was uncontradicted that there were women otherwise qualified excepted by their sex as jurors in Coffee county, Georgia. (R. pp. 15-19) The challenge was denied. (R. p. 19) Exception pendente lite presented, certified, and filed. (R. pp. 20-35)

During the trial and before the evidence closed, defendant offered as a witness his wife, Mrs. Eurus Cady. Objection was made that she was incompetent under section 38-1604 of the Code of Georgia. (Transcript of record Supreme Court of Georgia p. 35). It was thereupon stated into the record what her testimony would be if she were permitted to testify. (R. pp. 25-38). Thereupon the court refused to permit the testimony. (R. p. 38). Exception pendente lite was presented, certified and filed. (R. pp. 34-39).

The defendant was convicted. (R. p. 2).

A motion for new trial was filed (R. p. 40) and amended. Ground one of the amended motion assigned error on the denial the challenge to the array, and, as in the written challenge, charged that in the pretended performance of their duties the jury commissioners of Coffee county,

Georgia had misinterpreted Code section 59-106; and in so doing had deprived defendant of his liberty without due process of law, and denied to him the equal protection of laws all as guaranteed by the XIVth amendment to the Constitution of the United States (R. pp. 43-52).

Ground nine of the amended motion assigned error on the refusal to permit the wife to testify, averring that so to do had deprived the defendant of the equal protection of laws and due process of law guaranteed him by the XIVth amendment to the Constitution of the United States and guaranteed him by Article 1, Section 1, Paragraph III of the Constitution of Georgia (R. pp. 52-59).

The grounds of motion for new trial, as amended, were approved. (R. p. 59).

The motion for new trial, as amended, was overruled (R. p. 60-65).

Bill of exceptions was signed and certified, (R. p. 62-67) and the case carried to the Supreme Court of Georgia for review.

The Bill of exceptions was amended (R. p. 67).

The Supreme Court of Georgia affirmed the judgment of the lower court, holding that the challenge was without merit; and that the refusal of the lower court to permit the wife to testify for or against her husband was likewise without merit. The opinion is set forth in the transcript of the record of the Supreme Court of Georgia. (R. pp. 70-92).

The appellant, within the time required by the rules of the Supreme Court of Georgia, filed his motion for a rehearing on the 17th day of June, 1944 (R. pp. 92-113). The motion for rehearing was denied on July 18, 1944 (R. p. 113).

On July 24, 1944, appellant presented his application for leave to file a second motion for rehearing; (R. pp. 114-118) the filing of which was refused by justices J. J. Jenkens,

P. J., and Grice and Duckworth, J. J. for the reasons stated in a letter returning the same that the Supreme Court had adjourned its April session on July 21 by order, (R. p. 118) whereas the statutory adjournment period would have been July 31.

A stay of remittitur was on July 24, 1944, allowed for forty days from that date, and the order subsequently enlarged to fifty days.

IV

Federal Questions Were Properly Raised and Decided Adversely to the Appellant

The federal questions raised by the appellant in his challenge to the array were:

(a) That by the misinterpretation of section 59-106 of the Code of Georgia; and by consistently, wilfully, systematically, arbitrarily, and intentionally refusing and failing to select the name or names of any female, otherwise qualified, as jurors, notwithstanding, there were such in the county who were free-holders and experienced, upright, and intelligent citizens, abridged the defendant's privileges or immunities and deprived him of his liberty without due process of law, and denied to him the equal protection of the laws all guaranteed by the XIVth amendment to the Constitution of the United States.

(b) That by the denial of the right of the wife of the defendant to testify after it had been stated into the record what her testimony would be and that it was material to the defense of the defendant, and the holding by the Supreme Court that section 38-1604 of the Code of Georgia had deprived the appellant of equal protection of the laws and due process of law guaranteed him by the XIVth amendment to the Constitution of the United States and guaranteed to

him by Article 1, Section 1, Paragraph III of the Constitution of Georgia.

Said questions were raised by the appellant, in the first instance, by his written challenge to the array; preserved by exception pendente lite, as hereinbefore set forth, and in the second by exception pendente lite to the refusal of the lower court to permit, the wife of appellant to testify, by ground nine of his amendment to motion for new trial and preserved in the bill of exceptions to the Supreme Court of Georgia.

The Supreme Court of Georgia actually passed on the federal questions raised in the court below by the appellant, and decided said questions adversely to him.

Both the Trial Court and the Supreme Court of Georgia held that the section 59-106 which is as follows:

Revision of Jury Lists. Selection of grand and traverse jurors.—Biennially, or, if the judge of the superior court shall direct, triennially on the first Monday in August, or within 30 days thereafter, the board of jury commissioners shall revise the jury lists.

The jury commissioners shall select from the books of the tax receiver upright and intelligent men to serve as jurors, and shall write the names of the persons so selected on tickets. They shall select from these a sufficient number, not exceeding two-fifths of the whole number, of the most experienced, intelligent, and upright men to serve as grand jurors, whose names they shall write upon other tickets. The entire number first selected, including those afterwards selected as grand jurors, shall constitute the body of traverse jurors for the county, to be drawn for service as provided by law, except that when in drawing juries a name which has already been drawn for the same term as grand juror shall be drawn as a traverse juror, such name shall

be returned to the box and another drawn in its stead. (Acts 1878-9, pp. 27, 34; 1892, p. 61; 1899, p. 44.): and

Section 38-1604 which is as follows:

Husband and wife as witnesses against each other in criminal proceedings.

—Husband and wife shall not be competent or compellable to give evidence in any criminal proceeding for or against each other, except that either shall be competent, but not compellable, to testify against the other upon the trial for any criminal offense committed, or attempted to have been committed, upon the person of either by the other. The wife shall be a competent witness to testify for or against her husband in cases of abandonment of his child, as provided in section 74-9902. (Acts 1866, p. 139; 1880-1, p. 121; 1927, p. 145);

were not violative of the constitutional provisions as urged by the appellant, to wit: the XIV Amendment, as follows:

1-815. (6700) Citizenship. (Section 1.) All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws, and

The XIX Amendment, as follows:

1-827. Equal suffrage. (Section 1.) The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

1-828. How Article enforced. (Section 2.) Congress shall have power to enforce this article by appropriate legislation.

Accordingly, the Supreme Court of the United States has jurisdiction upon appellant to refuse the judgment of the Supreme Court of Georgia.

V

Appeal Is From a Final Judgment of the Highest Court of the State of Georgia—The Supreme Court of Georgia

The judgment of the Supreme Court of Georgia directs that the judgment of conviction in the lower court be affirmed. It is final both in form and substance, the Supreme Court of Georgia being the highest court of the State of Georgia.

VI

The Federal Questions Presented Are Substantial and Vital, and Were Actually Passed On by the Supreme Court of Georgia.

We do not find with our limited facilities, any case in point or parallel with the case at bar, on either of the questions presented:

1. Whether the selection of a jury in the manner and form pointed out by the record and under the provisions of section 59-106 of the State of Georgia, quoted above, is violative of the XIXth Amendment to the Constitution of the United States, quoted above, and whether or not such a selection deprived the appellant of the rights guaranteed to him under the XIVth Amendment of the Constitution of the United States, quoted above.

The decision of the Supreme Court of Georgia in this case cites *Rawlins* v. *State*, 124 Ga. 31 (1) which was affirmed

by United States Supreme Court, 201 U. S. 638, as authority for that the challenge to the array of jurors and particularly subparagraph (R. pp. 3-15) was without merit.

The challenge in the *Rawlins* case was to the array of grand jurors—and because the jury commissioners had excluded from the grand jury, all lawyers, ministers, doctors, dentists, railroad engineers and firemen, there being ten or other large number of each class in the county, who were citizens and residents, and possessed the qualifications required by law for grand jurors, and there being upon neither the grand-jury list nor in the grand-jury box any member of any of such classes. It was contended that the arbitrary exclusion of all of these classes without reference to their qualifications was a violation of the statute and constitution of this State, and especially that provision of the constitution which grants to every one due process of law, and that it was also in violation of the fourteenth amendment to the constitution of the United States, as well as of other provisions of that instrument, and had the effect to deny to the accused due process of law, as well as equal protection of the law, and abridged their privileges and immunities as citizens of the United States.

On demurrer this challenge was stricken, and the grand jury ordered to retire and enter upon a consideration of the case.

The court said; (p. 39) "All of the classes that were alleged to have been excluded from the jury-box in the present case belonged to either one or the other of the classes above referred to. They were either exempt, or their business was of such a character that it was reasonably certain that the judge would excuse them from service. There was no averment in the challenge that the exclusion was due to fraud or any improper motive. There was no suggestion that either the grand or traverse jurors drawn for service did

not possess the qualifications required by law. There was no objection to any of the jurors that were on either list. The sole objection was that the list was deficient in number."

So, that case was not authority for the decision in the case at bar, wherein it is charged that "The Jury Commissioners of Coffee County, * * * have, ever since August 26, 1920, the effective date of the XIXth Amendment to the Constitution of the United States, in the pretended performance of the duties imposed on them by Section 59-106 of the Code of Georgia, misinterpreted said section of the Code, and as a result of such misinterpretation of said section of the Code have consistently, wilfully, systematically, arbitrarily, and intentionally refused and failed to select from the books of the tax receiver the name or names of any female or females, residents of said County, otherwise qualified to serve as jurors, notwithstanding the fact that the books of such tax receiver contain and have contained at all times since said date the names of many females who were and are free holders, and are experienced, intelligent and upright citizens.

The XIXth Amendment to the Constitution of the United States provides that "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."

Such failure and refusal of said jury commissioners to select the name or names of any female or females and to place such females' or female's name or names in the jury box abridges defendant's privileges and/or immunities, deprives defendant of his life or his liberty without due process of law, and denies to defendant the equal protection of laws, all guaranteed him by the XIVth Amendment to the Constitution of the United States which provides that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;

nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction of laws the equal protection of laws." Defendant now claims special titles, rights, privileges, or immunities guaranteed him by the above named and quoted provisions of the Constitution of the United States and says that he is a citizen of the United States entitled to the protection of all of such provisions of its Constitution, that he is peculiarly interested in, and would be particularly injured by, the enforcement or denial of such titles, rights, privileges, or immunities, inasmuch as the alleged murder of which he is accused, for which he stands indicted, and on which bill of indictment the State of Georgia is now seeking to try him for his life by the panel of jurors about to be put upon him was a homicide occasioned because it was necessary for defendant to kill to save his wife's life, and that she is entitled to have females as well as males in the panel from which the jury will be chosen to return a verdict determining the existence or nonexistence of such necessity.

In said challenge it is also charged that: "Any interpretation of Section 59-106 of the Code which does not give to the word "men" appearing therein its basic, primary, or generic meaning, that is to say, any interpretation of the word "men" appearing in said section of the Code which does not include females as well as males within the interpretation of the word "man" appearing in said section of the Code, or which excludes females from the meaning given to said word "man" as said word appears in said section of the Code, whether such interpretation or construction be placed thereon by the jury commissioners or by the Courts deprives defendant of rights guaranteed him by the XIXth and by the XIVth Amendments to the Constitution of the United States and defendant now claims special rights, titles, privileges, or immunities under said

Amendments to the Constitution of the United States. Such interpretation would exclude females from jury service. Defendant, a citizen of the United States, shows that such exclusion would and does deprive him of liberty or property without due process of law, and would and does deny him the equal protection of laws, all of which are guaranteed him by said XIVth Amendment and that he is and would be directly injured by the denial of said rights so guaranteed him because the alleged murder of which he is accused, for which he stands indicted, and on which bill of indictment the State of Georgia is now seeking to put him to trial and put upon him a panel of jurors from which and on which it was impossible for a female's or females' name to appear, was a homicide, justified partly because it was necessary for defendant to shoot to save his wife's life."

Other cases cited as authority for the decision on this question are: *Powers* v. *State,* 172 Ga., (4) is a headnote decision without elaboration and is as follows:

"Under our law as it stands, females are not subject to jury duty, it being provided in the act of the General Assembly approved August 13, 1921 (Acts 1921, p. 106), that 'females shall not be liable to discharge any military, jury, police, patrol, or road duty.' And this law is not obnoxious to the nineteenth amendment to the constitution of the United States, which reads as follows: 'The right of citizens of the United States to vote shall not be denied or abridged by the United States or any State on account of sex.' This amendment to the constitution does not contemplate that the State shall be required to place the names of females in the jury-box."

It is not disclosed how the point was raised, and obviously there was no challenge equivalent to illegality or fraud as in the case at bar.

Griffin v. *State,* 183 Ga., 775-777: "It is a well-known axiom of the law that this court will not consider a constitu-

tional attack upon an act where the party attacking the same 'does not allege any injury accruing to him by the enforcement of the act,' and 'A court will not listen to an objection made to the constitutionality of an act by a party whose rights it does not affect, and who has, therefore, no interest in defeating it,' and 'a party must be prejudiced by the enforcement of a statute, or the courts will not listen to an objection by him to its constitutionality.' "

So, this case is likewise not authority for the holding that "the challenge to the array as set forth in subsection (b) thereof is without merit."

1. Whether the refusal to permit the wife to testify and thereby holding that section 38-1604 did not deprive appellant of the rights guaranteed him under the XIVth Amendment to the Constitution of the United States, quoted above.

The opinion in the case of *Melton* v. *State,* 180 Ga. 104 (1) cited by the Supreme Court of Georgia as authority for holding that the wife was not a competent witness to testify for or against her husband, embodies citations from United States cases, one of which was *Mobile, etc., Railroad Company* v. *Turnipseed,* 219 U. S. 35 (31 Sup. Ct. 136, 55 L.E.D. 78, 32 L.R.D. 226, Ann. Cas. 1912, 436) in which this principle is laid down.

(P. 106) "If a legislative provision not unreasonable in itself, prescribing a rule of evidence, in either criminal or civil cases, does not shut out from the party affected a reasonable opportunity to submit to the jury in his defense all of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him."

The converse of this principle should be held to be true, i. e.

'If a legislative provision is unreasonable in itself, if it prescribe a rule of evidence, in either criminal or civil

cases, which does shut out from the party affected a reasonable opportunity to submit to the jury, in his defense, all of the facts bearing upon the issue, there is ground for holding that due process of law has been denied him;' and this statement of principle applied to the case at bar would be equally sound when used as a test for violation of the Federal Constitution, as it has only to do with due process and equal protection of law.

In the *Melton* case, *supra,* the defendant challenged the Section (then 1037 par. 4—now 38-1604) as unreasonable, contrary to public policy, and violates (violative of) the due process and equal protection clauses of the State and Federal Constitutions."

The court held (p. 105) "There is no merit in any of these contentions.", and further "*If the statute is not void upon constitutional grounds, it can not be said that it is either unreasonable or contrary to public policy,* (underscoring ours—for emphasis) and also "A constitutional statute can not be declared inoperative because opposed to public policy, since the statute itself determines public policy," also at p. 108 the court held: "We have stated that the wife's incompetency is a matter of statute in this State. While it is true that the rule as applied in this case is identical with the common law, it is not merely in virtue of the common law that rule exists in this jurisdiction. By legislative action it has been given the force of a specific statute, and as such it is binding upon courts, *in the absence of valid constitutional objection.*" (Underscoring ours—for emphasis.)

The case at bar is distinguished in that it is an attack upon the statute upon definite constitutional grounds which are specifically laid—(See R. 34-39 and 52.)

The Supreme Court of the United States has jurisdiction on appeal to determine whether a State statute as

construed and applied to the facts of a particular case by the highest court of the State is in conflict with the Federal constitution, for the application of the statute affirms its validity as so applied. *Fiske* v. *Kansas*, 274 U. S. 380.

Conclusion.

Wherefore, it is respectfully submitted that the appellant in the above entitled cause comes within the proper jurisdiction of the Supreme Court of the United States.

HARRY M. WILSON,
E. L. GRANTHAM,
R. A. MORSE,
Attorneys for the Appellant.